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Legal and Sustainable Development Impacts of Major Oil Spills

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Abstract

Oil spills trigger the application of several interrelated national, regional, and international laws and regulations that provide windows of redress for victims. This paper provides a summary of the legal and sustainable development principles at play where oil spills occur. It provides a simplified synopsis of the relevant principles of international environmental law through which victims of oil spillage can seek compensation. It also highlights the absence of a comprehensive convention on safety standards for oil platforms in international laws applicable to oil spillage.

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1. Introduction

On December 21, 2011, Shell Nigeria announced what it describes as its worst oil spillage in a decade in the Niger Delta area.¹ Over 40,000 barrels of crude oil spilled in one day. For over five decades, a series of similar oil spills have caused extensive damage to the ecology of the Niger Delta. According to a 2011 report of the United Nations (UN), many of the environmental and social consequences of oil spillage in the Niger Delta are now irreversible.²

The Niger Delta's dire situation is not an isolated one; the tragic consequences of oil spillages are apparent in many nations of the world. One of the largest oil spills in history occurred in 2010, when up to 4.9 million barrels of BP oil

¹ J Vidal, 'Nigeria on alert as Shell announces worst oil spill in a decade' available at <<http://www.guardian.co.uk/environment/2011/dec/22/nigerian-shell-oil-spill>> (accessed 23 May 2012).

² UNEP, 'Environmental Assessment of Ogoni Land' available at <<http://www.unep.org/nigeria/>> (accessed 02 June 2012).

flooded the Gulf of Mexico over a three-month span.³ These events have far-reaching legal consequences, which I will discuss. Oil spills raise similar legal issues regardless of where they occur, whether in the waters of Nigeria's Niger Delta or off the Mississippi coast. As such, I have adopted a crosscutting international perspective in this discussion. I also highlight the absence of a comprehensive convention on safety standards for oil platforms in international laws applicable to oil spillage.

2. Legal and Sustainability Issues Raised by Oil Spillage

Sustainable development in international law refers to "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."⁴ In the context of state actions and policy measures, it refers to "state efforts to achieve progress (development) qualified by the condition that such efforts should be possible to maintain over the long term (sustainable)."⁵ Sustainable development envisions a symbiotic balance between two pursuits that are often portrayed as mutually exclusive: maintenance of a sound environment, and economic and social development.⁶ It advocates for the adoption of developmental policies that protect the environment from degradation. It also emphasizes a comprehensive and integrated approach to economic and social development processes through judicious and thoughtful use of the environment such that it will be maintained for coming generations.⁷ In essence, sustainability in its broadest sense refers to the use of the environment and its resources at a rate less

³ U.S President Obama declared it as the 'worst environmental disaster America has ever faced'. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, REPORT TO THE PRESIDENT, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING vi (2011) *available at*

<http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf> (accessed 02 June 2012).

⁴ The United Nations World Commission on Environment and Development Report (the Brundtland Report) *Our Common Future* (OUP 1987).

⁵ H Christian Bugge & C Voigt, (eds), *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 88. For detailed and extensive discussions on sustainable development, its evolution, principles and application to national and international laws, see generally, Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law* (Oxford University Press 2004)1; Nico Schrijver, *The Evolution of Sustainable Development Law: Inception, Meaning and Status* (Martinus Nijhoff Publishers 2008) 1.

⁶ See R Mushkat, 'Environmental Sustainability: A Perspective from the Asia-Pacific Region' (1993) 27 UBC L Rev 153 at 155.153.

⁷ See T Kuokkanen, *International Law and the Environment* (Kluwer Law International 2002) xxi at 333 See also *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* where the International court of Justice noted that 'the need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'.

than or equal to the natural rate of regeneration or reproduction.⁸ It advocates that our use of the environment today must not diminish its usefulness for future generations.⁹

The agreed-upon considerations for assessing sustainability are economic, social, and environmental.¹⁰ To achieve sustainable oil exploration, these three considerations must be balanced in a way that minimizes trade-offs.

i) *The economic criteria:* For exploration to be considered sustainable, it must lead to financial returns and profits to local entities as well as a positive balance of payments and technology transfer.¹¹ It must lead to improvements in the economic activities in the resource-based country and the economic development of the host country. It should also result in the emergence of clean and efficient technologies in the host country.

ii) *The social criteria:* This focuses on the need for oil exploration to result in greater equity and improved quality of life in the resource-based country. It must alleviate the suffering of the country by providing social infrastructures that were previously non-existent or inefficient. Examples include improved access to clean, affordable and sustainable water supply; improved transportation through projects that emphasize efficiency and reduced reliance on fossil fuels; improved health facilities and services through the transfer of modern, energy-efficient technologies; and improved power supply through the transfer of alternative energy sources such as solar panels, wind turbines, and hydroelectric power plants. As such, if oil exploration does not bring about improvements in the quality of life for the citizens of the resource-based country, it cannot be adjudged as leading to sustainable development.¹²

iii) *The environmental criteria:* These are arguably the most important criteria of all. The concept of environmental sustainability advocates the use of the environment and its elements in a way that preserves its capacity to serve future generations. The needs of the present population should be met without compromising the ability of future generations to meet their own needs.¹³ This calls for prevention and precaution in the use of the environment. For example, the Rio Declaration on Environment and Development declares that “man...bears a solemn responsibility to protect and improve the environment for present and future

⁸ D Pearce & Kerry R Turner, *Economics of Natural Resources and the Environment* (Baltimore, Maryland: The John Hopkins University Press, 1990) 24.

⁹ *The Report of the National Task Force on Environmental Economy* (Ottawa: The National Task Force on Environmental Economy, 1987) 1 at 3.

¹⁰ See Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law* (Oxford University Press 2004) 1.

¹¹ *ibid.*

¹² See H Christian Bugge & C Voigt, (eds), *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 88.

¹³ The World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987).

generations.”¹⁴ Article 192 of the Law of the Sea Convention (LOSC) places an obligation on states to “protect and preserve the marine environment.” This includes a duty to prevent, reduce, and control pollution of the marine environment from any source.¹⁵

In essence, international law advocates that oil production should not result in pollution or environmental degradation in the resource-based country. The use of environmentally sustainable technologies (ESTs) during oil exploration could help companies avoid oil spillage and gas flaring. Oil exploration should instead catalyze the resource-based country’s progress in environmental sustainability through promoting the conservation of local resources, preservation of biodiversity in oil producing areas, and reduced pressure on local environments.¹⁶ Unfortunately, oil production in many resource-based countries has produced opposite results.

2.1 Environmental Impacts of Oil Spills

Major oil spills have resulted in environmental pollution in many resource-based countries. This spillage is a violation of a multitude of national and international laws and regulations on environmental pollution and damage.¹⁷ The situation in Nigeria’s Niger Delta helps illustrate how oil spillage negatively impacts the environment.

As a result of the high frequency of oil spills in the Niger Delta, many local communities have been destroyed, drinking water has been contaminated, and the ecosystem and soil composition have been altered irreversibly. Studies show that in the Niger Delta, a year’s supply of food is often destroyed by only a minor leak of

¹⁴ United Nations, *Rio Declaration on Environment and Development*, see online: UN, <http://www.unep.org/Documents/Multilingual/Default.asp?DocumentID=78&ArticleID=1163>

¹⁵ Article 194. Any source covers oil spillage or pollution incidences outside the rig for example oil spillage in marine waters during transportation. As such there are several international treaties for such maritime oil spillage. These include: The Convention on Limitation of Liability for Maritime Claims (LLMC) 1976; The International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992; The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Fund Convention) 1992; The International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunkers Convention) 2001; The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention) 1996.

¹⁶ See D Pearce & Kerry R Turner, *Economics of Natural Resources and the Environment* (Baltimore, Maryland: The John Hopkins University Press, 1990) 24; Nico Schrijver, *The Evolution of Sustainable Development Law: Inception, Meaning and Status* (Martinus Nijhoff Publishers 2008) 1.

¹⁷ Environmental damage is a change that has a measurable adverse impact on the quality of a particular environment or any of its components, including its use and non-use values, and its ability to support and sustain an acceptable quality of life and a viable ecological balance.

oil, debilitating the farmers and their families who depend on the land for their livelihood. Drinking water has also been contaminated by oil causing serious health problems to the inhabitants of the Niger Delta. Over 3,000 inhabitants of the Niger Delta have died from drinking contaminated water. Offshore spills, which are usually much greater in scale, taint coastal environments in the Niger Delta, causing a decline in local fishing production. The rainforest, which previously occupied 7,400 km², has disappeared. Similarly, oil spillage in the Niger Delta has destroyed its mangrove forests. Estimates suggest that 5-10% of Nigerian mangrove ecosystems have been wiped out by oil, which acidifies the soils, thus halting cellular respiration and starving plant roots of oxygen.

The overall adverse effects of oil exploration in the Niger Delta, Nigeria, have been summarized as follows:

We witnessed the slow poisoning of the waters of this country and the destruction of vegetation and agricultural land by oil spills which occur during petroleum operations. But since the inception of the oil industry in Nigeria more than twenty five years ago, there has been no concerned and effective effort on the part of the government, let alone the oil operators, to control environmental problems associated with the industry...We don't have pipe borne water here, our only source of drinking water is the surrounding stream and creeks, but we can no longer drink the water because it has been polluted. Everywhere you go, you see dead fishes and layers of crude oil.¹⁸

Oil spillage brings about devastating and sometimes irreversible damage to wetland ecology, wildlife, and biodiversity, most of which have been accorded legal protections in national and international law.¹⁹ Oil spills put the state in violation of various treaty obligations under international law. The duty of a state to perform its obligation under a treaty is clearly provided for in Article 26 of the Vienna Convention on Law of Treaties.²⁰ International environmental law recognizes environmental sustainability as one of the pillars of sustainable development and one of the Millennium Development Goals (MDGs).²¹ Major oil spills violate these

¹⁸ Quoted in Greenpeace International, 'Shell Shocked: The Environmental and Social Costs of Living with Shell in Nigeria (1994)', available at <<http://archive.greenpeace.org/comms/ken/hell.html>>; see also H Dappa-Biriye, R Briggs, B Idoniboye-Obu and M Fubara, 'The Endangered Environment of the Niger Delta: Constraints and Strategies' (An NGO Memorandum for the World Conference of Indigenous Peoples on Environment and Development and the United Nations Conference on Environment and Development, Rio de Janeiro) 52.

¹⁹ There are currently over hundred international treaties seek to protect and preserve each of these elements of the environment. See for example *1992 Convention on Biological Diversity*; adopted 22 May 1992; in force on 29 December 1993.

²⁰ The *pacta sunt servanda principle*: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

²¹ Article 7, Annex III of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) imposes a specific

international environmental principles of sustainable development, particularly the prevention principle and the precautionary principle.²²

International law aside, oil spills also violate a number of domestic laws in resource-based countries. Many oil-producing countries have environmental laws, such as Clean Water Acts, Oil Pollution Acts, Fishery Acts, and Endangered Species Acts that seek to prevent environmental pollution and even to provide penal consequences for violation.²³ Oil spillage results in a violation of some of these local enactments and provides justiciable causes of action by state enforcement authorities for civil and criminal lawsuits. For example, over 130 lawsuits relating to the BP spill have been filed in U.S. courts by different agencies.²⁴ By respecting and promoting sustainable oil exploration, many international oil companies (IOCs) can avoid such long and often expensive litigation.

The other sustainable development and human rights impacts of oil spills are described in more detail below.

2.2 Loss of Business Profits and Subsistence Rights

Oil spillage leads to loss of income and means of subsistence for individuals and companies in the commercial fishing, shrimp, and oyster industries. This affects fishermen and -women, charter boat operators, owners of hotels, tourist management agencies, rental property owners, and other businesses in coastal resort areas. Thus, oil spillage is a violation of some of the international and national law principles, which seek to protect the rights of individuals to their means of subsistence. For example, over 30,000 individual claims have been filed by businesses

obligation on the Contracting Parties to 'take appropriate measures, both individually and within the relevant international organizations, to prevent and eliminate pollution resulting from the abandonment of offshore installations in the maritime area caused by accidents'. Also the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (the Barcelona Convention) applies the precautionary and polluter pays principles (Article 4(3)) and requires the use of best available techniques and best environmental practices (Article 4(4)) to minimize pollution resulting from seabed exploration and to cooperate in dealing with any pollution incidents.

²² This principle requires that where there are threats of damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

²³ See for example Canada's 1985 Fisheries Act R.S.C. 1985 c. F-14, ss. 34-42; 1999 CEPA (*The Canadian Environmental Protection Act*) S.C. 1999 c. 33, ss. 39-103; *The United States' 1980 CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act of 1980)* 42 U.S.C. ss. 9601-9675, US 1990 OPA (*Oil Pollution Act of 1990*) 33 U.S.C. ss. 2701 – 2761; *German Environmental Liability Act 1990*; *Venezuela's 1976 Environmental "Frame" Act*; *Venezuela's 1992 Criminal Environmental Act Section 16 and 22*. *Denmark's 1994 Compensation for Environmental Damage Act 225/94*; *Nigeria's National Environmental Standards and Regulations Enforcement Act (NESREA)*.

²⁴ See A. Sachdev, 'Tide of oil spill lawsuits begins to rise' (Chicago Tribune, 18 May 2010).

and workers in the Gulf region against BP, seeking repayment for profits and income that were lost because of the oil spill.

A number of international treaties recognize subsistence rights as inherent human rights, which must be protected by states.²⁵ Paragraph 10 (c) of the *UN Norms and Responsibilities of Transnational Corporations and other Businesses with Regard to Human Rights* compels multinational corporations (MNCs) to protect the subsistence rights of individuals in their operations.²⁶ Subsistence rights were recognized in the *Yanomami Case* in which the Inter-American Commission called on states to restore, protect, and preserve the rights of indigenous peoples to their ancestral territories because they depend upon them for farming, hunting, subsistence, and continuity of life.²⁷ Similarly, in the *Toledo Maya* case, the Commission noted that “development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.”²⁸

To protect subsistence, international environmental law places a duty on the polluter corporation to pay victims of oil pollution adequate compensation for economic and pecuniary losses incurred. For example, in line with this obligation, after the Deepwater Horizon explosion, BP announced a \$20 billion escrow fund that would be used to compensate businesses and workers in Louisiana, Mississippi, Alabama, Florida, and Texas, whose financial livelihood suffered as a result of the oil spill.²⁹

2.3 Forced Displacements and Loss of Property

²⁵ See Article 23 of the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant of Economic and Social Rights (ICESR).

²⁶ It provides that:

Indigenous peoples and communities shall not be deprived of their own means of subsistence, nor shall they be removed from lands which they occupy in a manner inconsistent with Convention No. 169. Further, they shall avoid endangering the health, environment, culture and institutions of indigenous peoples and communities in the context of projects, including road building in or near indigenous peoples and communities. Transnational corporations and other business enterprises shall use particular care in situations in which indigenous lands, resources, or rights thereto have not been adequately demarcated or defined. E/CN.4/Sub.2/2003/38/Rev.2

²⁷ See, e.g., *Yanomami Case*, Rep. No. 12/85, Case 7615 (Brazil), (1985); *Mary and Carrie Dann Case*, Report No. 99/99, Case 11.140 (United States) (1999); *Precautionary measures, De Vereniging van Saramakaanse* (Suriname) (August 8, 2002).

²⁸ *Toledo Maya Case*; see also Inter-Am. C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97 Doc. 29 rev.1, ch. VI (Sept. 29, 1997).

²⁹ ‘BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions’ available at

<<http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=706296>> (accessed 12 May 2012).

Closely intertwined with the loss of subsistence is the loss of property or damage to property occasioned by major oil spills. Oil spillages most times result in damage to residential and commercial properties located along the coastal zones and small islands offshore where major oil spills occur. Property damage also arises from the use of toxic chemicals and oil dispersants to aid the clean-up of major oil spills. This also results in forced displacements and relocation for individuals in affected areas. For example, over 200,000 Niger Deltans have been forcefully displaced from their homes due to oil spillage. Such loss of property violates some of the constitutional rights to free and exclusive ownership and enjoyment of property in many national constitutions.³⁰ It is also a violation of the right to exclusively own and possess property as guaranteed under international law.

The right to property is one recognized in John Locke's famous human rights tripod of "life, liberty and possessions."³¹ The Universal Declaration of Rights (UDR) recognizes the right of individuals to the exclusive possession and use of property.³² This right is also recognized by the American Convention on Human Rights,³³ the African Charter on Human and Peoples Rights,³⁴ and the European Convention on Human Rights.³⁵ The African Court on Human Rights upheld this

³⁰ For example the Fifth Amendment to the United States Constitution provides that 'nor shall private property be taken for public use, without just compensation'.

³¹ J Locke, *Two Treatises of Government*, available at <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm>. (Accessed 21 January 2011).

³² See Article 17 'Everyone has the right to own property alone as well as in association with others' 17 (2) No one shall be arbitrarily deprived of his property. See UDHR, adopted 10 Dec.1948, G.A Res.217A9 (III), 3 UN GAOR, UN Doc. A/6310 at 71 (1948) available at <http://www.un.org/en/documents/udhr/>

³³ Article 21 provides that 'Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 21(2) 'No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 21(3) Usury and any other form of exploitation of man by man shall be prohibited by law. See American Convention on Human Rights (pact of San Jose) signed 22 Nov. 1969, entered into force 18 July, 1978, 1144 UNTS 123, OASTS 36, OASTS 36. Available at <http://www.oas.org/juridico/english/treaties/b-32.html>

³⁴ The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. Charter on Human and Peoples Right, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U Doc. CAB/LEG/67/3 Rev. 5. Available at http://www.africaunion.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf.

³⁵ It provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any

right in the case of *SERAC v. Nigeria* in which the court found the government of Nigeria in violation of right to property of the Ogoni people in Nigeria's Niger Delta due to its condoning and facilitating the operations of oil corporations in Ogoniland. The Commission also held that the implied right to housing, including protection from forced eviction, which is derived from the express rights to property, health and, family, was violated by the destruction of housing and forceful eviction of residents from their homes.³⁶

2.4 Health Risks

Major oil spills affect human health and well-being, an important tenet of environmental sustainability. Residents of oil-producing areas at times have to cope with drinking water that contains residual oil even many years after clean-up. There are also the lasting health effects of chemical dispersants used during clean-up.³⁷ For example, many residents of the Niger Delta have complained of asthma, breathing difficulties and pain, headaches, nausea, and throat irritation as well as chronic bronchitis.³⁸ Such health concerns can bring about substantive causes of action in toxic tort for exposure to dangerous substances and chemicals.³⁹ It has also been held to be a violation of the fundamental right to health in the Nigerian case of *Jonah Gbemre v. Shell*, in which the Nigerian federal court held that gas flaring and oil spillage by Shell in the course of their oil exploration and production activities in the applicant's community were violations of the fundamental right to a healthy environment and dignity of human persons. This right was guaranteed by the Constitution of the Federal Republic of Nigeria and the African Charter on Human and Peoples Rights, which provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.⁴⁰

The right to health can be found in a number of international treaties. The UDR provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. The United Nations International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes the "right

way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

³⁶ (2001) AHRLR 60 (ACHPR 2001). Communication 155/96.

³⁷ See 'Oil clean-up chemicals worry environment watchdogs' (Reuter 04 May 2012) available at <<http://www.reuters.com/article/2010/05/04/oil-rig-leak-chemicals-idUSN0411028320100504>> (accessed 23 May 2012).

³⁸ See Environmental Rights Action, 'Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity' Amsterdam, June 2005. This booklet can be found at both www.climatelaw.org and at www.eraction.org.

³⁹ See for example *Abiola V Ijeoma* (1970) 2 ANLR.

⁴⁰ See Sections 33(1) and 34(1) of the 1999 Constitution of Nigeria. See also *Jonah Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others*. No. FHC/B/CS/53/05, (Nov. 14, 2005) Federal High Court of Nigeria, available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf>

of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁴¹ One of the steps listed in in the ICESCR for states to achieve this is the improvement of all aspects of environmental and industrial hygiene. This would include environmental sustainability and the prevention of industrial and environmental health hazards. Article 11 of the American Declaration of the Rights and Duties of Man also provides that every person has the right to the preservation of his health, while the first protocol of the American Convention on Human Rights provides that “everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.”⁴²

In order to foster the protection of the right to health, states are to take public health measures to prevent epidemic, endemic, occupational, or environmental diseases. For example, Article 11 of the European Social Charter enjoins member states to remove as much as possible the causes of ill health. One way to minimize the short and long term impacts of climate change is to ensure that transparent environmental impact assessments (EIA) are conducted before the approval of projects to show clearly their likely environmental and health impacts.⁴³ In the 2006 case of *Sawhoyamaxa Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights unanimously found Paraguay in violation of rights to health, life, and property of the Sawhoyamaxa indigenous community for failing to remove projects that cause pollution, ill health, and diseases in this indigenous community.⁴⁴ The Court called on the State to demarcate the indigenous lands and provide a development fund, among other remedies.⁴⁵

2.5 Loss of Life and Wrongful Death

Major oil spills lead to loss of lives of oil workers and residents of oil-producing areas. For example, 11 BP workers were killed in the 2010 disaster. Families of these deceased workers have consequently filed wrongful death lawsuits against BP.⁴⁶ The tort of wrongful death exists in many common law countries for cases when a person dies due to the legal fault of another person. For example, virtually every state in the United States has a wrongful death law, which allows

⁴¹ Article 12 of the ICESCR.

⁴² Article 10.

⁴³ See UNECE, The Espoo Convention on Environmental Impact Assessment in a Transboundary Context adopted February 25, 1991 EmuT 991:15.

⁴⁴ *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 248(1)–(3) (Mar. 29, 2006).

⁴⁵ *Id.* at 239–241.

⁴⁶ NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, REPORT TO THE PRESIDENT, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING vi (2011) *available at* <http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf> (accessed 12 May 2012).

families of a deceased person who dies in accidental or negligent circumstances to sue for compensation.⁴⁷

Under international law, the right to life enjoys maximum guarantee. It is a supreme human right from which no derogation is permitted, even in times of war or public emergency.⁴⁸ As such, the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* places a responsibility on multinationals to protect the right to life of their workers and of the residents of any country where they do business.

2.6 International Liability Issues

Major oil spills could affect the waters and environmental quality in nearby countries. For example, Mexico claims that the BP oil spills provided cross-border effects in Mexico. This is a violation of Article 194(2) of the Law of the Sea Convention, which requires states to “take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.” This Convention places a duty on states to respect the territorial integrity and sovereignty of other states in the use of resources and to prevent trans-boundary pollution. Principle 21 of the 1972 *Stockholm Declaration* also provides that states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁴⁹

An aggrieved state can bring an action before the International Court of Justice (ICJ) under the court’s jurisdiction in Article 36(2) (c) for a violation or breach of an international obligation to prevent trans-boundary pollution.⁵⁰

2.7 Clean-up Obligations and Costs

Major oil spills can take several years to clean up. For example, the United Nations estimates that the restoration process in Nigeria’s Niger Delta could take up to 30 years with a projected cost of \$1 billion (USD) in the first five years.⁵¹ This

⁴⁷ See for example Wrongful Death Act of Indiana, Ind. Code 34-23-1-1; see also Wrongful Death Statutes in Ohio RC 2125.01 and 2125.02.

⁴⁸ M Nowak, ‘Civil and Political Rights’ in J Symonides, *Human Rights Concepts and Standards* (Ashgate, 2000) 75.

⁴⁹ See UNEP,

<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

⁵⁰ See *Trail Smelter Arbitration* (U.S.A. v. Canada), 1938-1941, 9 I.L.R. 315; *Lac Lanoux Arbitration* (France v. Spain), 1957, 24 I.L.R. 101.; *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovak Republic), 32 ILM (1993) 1293;

⁵¹ UNEP, ‘Environmental Assessment of Ogoni Land’ available at <<http://www.unep.org/nigeria/>> (accessed 02 June 2012).

illustrates the fact that the costs of clean-up, restoration, and reclamation are often enormous and far-reaching.

International environmental law therefore places a duty on the multinationals to pay for such clean-up costs. The polluter-pays principle advocates that the polluter should bear the cost of preventing damage to the environment. The object of this principle is to channel the costs of prevention and reparation of environmental damage to the legal or juristic person who is in the best position to prevent such damage and thus “internalize” the costs of pollution damage.⁵² For example, the UN recommended that Shell should set up an Environmental Restoration Fund to support clean-up and restoration in the Niger Delta.⁵³

3. Conclusion

The principle of sustainable development advocates the balancing of environmental goals and objectives with economic and social goals. As such, while oil exploration has enormous economic potential, it must be done in ways that would protect the human and natural elements of the environment. Unsustainable oil exploration and oil spillage could jeopardize human health, threaten human life, and result in the violation of several interrelated national, regional, and international laws and human rights principles that took the world many years to foster. International law places an obligation on international oil companies (IOCs) and governments to avoid pollution related to oil production. As such, whenever oil spillage occurs, the IOC involved often bears the risk of paying compensation, while the country where such a corporation is located may bear more responsibility in cases of trans-boundary pollution. There are also other parties who could be joined to such lawsuits. These might include owners of the drilling rig, well contractors, and manufacturers of any malfunctioning equipment, such as the underwater well’s blowout preventer.⁵⁴

Despite these concrete regulations, there is a gap in international laws applicable to oil spillage. This is the absence of a comprehensive convention on safety standards for oil platforms. The UN Convention on the Law of the Sea

⁵² European Environmental Bureau. *Environmental Liability in Europe: Concerning the Need for a European Directive on Environmental Liability*. 1997. Chapter 1.

⁵³ UNEP, ‘Environmental Assessment of Ogoni Land’ available at <<http://www.unep.org/nigeria/>> (accessed 02 June 2012).

⁵⁴ For example in the BP case Transocean, which owned the Deep-water Horizon drilling rig, Halliburton, the well contractor, and Cameron International, the company that manufactured the underwater well’s blowout preventer, which malfunctioned and failed prevent the oil spill gave all being sued in different cases by individuals and state authorities. Many of these diverse suits have been consolidated as class actions or multidistrict litigation (MDL). See www.laed.uscourts.gov/OilSpill/OilSpill.htm. (To learn more about MDL and what happens when cases like these are consolidated, See NOLO, ‘Multidistrict Litigation (MDL) for Drug Lawsuits and Other Cases’ available at <<http://www.nolo.com/legal-encyclopedia/multidistrict-litigation-mdl-drug-lawsuits-32952.html>> (accessed 12 May 2012).

currently relies on its parties to prevent pollution from oil platforms. Such an approach has led to varied and at times low standards of regulation in many countries. An international convention might help to establish international best practice standards that could prevent and reduce the incidences and reoccurrences of major oil spillage. Its importance is underscored by the fact that some effects of oil spillage are permanent and irreversible. Such a convention would offer a preventive approach to ensure that minimum safety standards are applied wherever a drilling operation takes place.

In order to comply with the theory of sustainability, such regulation or treaty should include provisions that enforce three standards: prevention, response, and financial liability. To ensure *prevention*, technical standards must be imposed on corporations to ensure that only oil drilling equipment that meets the highest safety standards will be approved for exploration activities. This would prevent instances such as the BP oil spill in which the blow-up preventer allegedly failed when pressure reached rose past the limit. This would also prevent instances whereby international oil companies use below-par drilling technologies for operations in developing countries. An international safety standard would enforce unified technical requirements for drilling irrespective of the location or country where drilling would be carried out.

Under *response*, corporations must be required to demonstrate response plans in case of blow-ups or spillage. For example, the absence of an adequate response plan was demonstrated in the Deep-water Horizon case when it took BP several months to design and drill a relief well that would stop the massive amount of oil leaking into the seawater. To prevent this, corporations must be required to submit their contingency and response plans to national authorities before getting the go-ahead for oil exploration. In the contingency plans, they should be required to demonstrate that they can design these relief wells in a timely manner and that they have the capacity and technology in place to minimize the effects of a blow-up or spillage.

Corporations must also demonstrate their plans for clean-up in case of oil spillage. This would include showing that they have the *financial means* to pay for the cost of clean-up, restoration, and reclamation in the event of an accident. Corporations must also demonstrate the capacity to pay compensation to victims of environmental damage in case of spillage. As shown in this paper, many victims of spillage lose their income, subsistence, properties, and health to major oil spills. Corporations must demonstrate strong financial capacity to pay for the losses suffered by these victims in case of spillage. This would prevent the situation in Nigeria's Niger Delta, in which many residents who have lost their subsistence, lives, and properties to oil spillage have gone without compensation for several years.

The importance of an international convention that provides safety standards for oil platforms and enforces them cannot be overemphasized. Such a convention would prevent or minimize the human rights and sustainable development consequences of major oil spills.

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